

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DANIELS,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 237801

Wayne Circuit Court

LC No. 00-013921

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony-murder, MCL 750.316(1)(b), carjacking, MCL 750.529(a), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for his felony-murder conviction, and twenty-three years, nine months to thirty-three years, four months for both his carjacking and armed robbery convictions, to be served concurrently, but consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We vacate defendant's convictions and sentences for carjacking and armed robbery, but affirm his remaining convictions and sentences.

I. Facts and Procedure

On November 18, 2000, defendant Anthony Daniels, Ralph Patton and Jamie Exton, were walking on Heyden Street in the city of Detroit when they saw the victim, Gregory Flesner, who they did not know, sitting in a green Dodge Shadow. They decided to take Flesner's money to purchase marijuana. They took Flesner and the car at gunpoint and forced Flesner to drive to a deserted area near Burt and Fullerton, where Flesner was fatally shot.

Four days later, defendant, Exton and two others were apprehended with Flesner's green Dodge Shadow. While in police custody, defendant and Exton each gave two statements to police. Both Exton and defendant claimed in their initial statements to police that Patton shot Flesner. However, Exton stated in a subsequent statement to police that defendant shot Flesner. According to police officer Isiah Smith, defendant admitted in his second statement to police that he participated in the carjacking and murder.

Exton pled guilty to second-degree murder and felony firearm. As part of the plea agreement, Exton agreed to testify truthfully at defendant's trial. Patton was arrested in his home

on November 24, 2000, and eventually entered into a plea agreement and pled guilty to second-degree murder. Patton also agreed to testify truthfully at defendant's trial. Both Exton and Patton testified that defendant shot Flesner.

II. Analysis

The jury convicted defendant of first-degree felony murder predicated on two underlying felonies: carjacking and armed robbery. Defendant first argues that his convictions for first-degree felony murder and the underlying felonies of carjacking and armed robbery violate his constitutional right against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. The prosecution concedes the argument and requests that defendant's carjacking and armed robbery convictions be vacated.

Convicting a defendant of both felony murder and the underlying felony violates the constitutional protections against double jeopardy. *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981); *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Id.* Therefore, defendant's convictions and sentences for carjacking and armed robbery are vacated.

Defendant next argues that the trial court improperly failed to instruct the jury regarding the proper use and effect of a prior inconsistent statement from Exton. Defendant did not preserve this issue by raising a timely objection to the jury instructions. In order to avoid forfeiture of this unpreserved issue on appeal, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant has not shown a plain error affecting his substantial rights. Defendant argues that the trial court improperly failed to instruct the jury regarding the proper use and effect of Exton's first statement implicating Patton as the shooter, which was inconsistent with his trial testimony in which he claimed defendant was the shooter. When no request has been made for a limiting instruction on the use of prior inconsistent statements, "the general rule is that relief will not be given when there is no demonstration or likelihood of prejudice" *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989), citing *People v Kohler*, 113 Mich App 594, 599-600; 318 NW2d 481 (1981).

At trial, Police Officer Smith testified that he was aware that Exton gave two statements to the police. Both Exton and Smith testified that Exton's first statement implicated Patton as Flesner's shooter. This statement was not published to the jury. In Exton's second statement, Exton told police that defendant shot Flesner. Smith read Exton's second statement into the record at trial. At trial, Exton testified consistently with his second statement. Exton admitted that he lied in the first statement to police.

Defendant's theory at trial was that Patton was the shooter, and that the involvement of Smith and other police officers caused Exton to change his previous truthful statement into a false statement that implicated defendant as the shooter. Defendant's entire closing argument focused on Exton's first statement to prove that defendant was not the shooter. For instance, defense counsel stated in closing argument, "[s]o Mr. Exton and Mr. Daniels are arrested driving around in Mr. Flesner's car. They're brought in for questioning. They both make statements,

which are fairly consistent. Yeah, it was Ralph Christopher Patton that shot the man.” This argument is clearly directed toward proving Patton shot Flesner by using Exton’s prior inconsistent statement as substantive proof.

The failure to give a jury instruction regarding the use and effect of Exton’s prior inconsistent statement was not an error that affected defendant’s substantial rights because defendant was not prejudiced by the omission of the instruction. Even if the trial court erred in not giving the instruction, the error worked in defendant’s favor. Exton’s first statement to police was an out of court statement of a witness and was admissible only for impeachment purposes. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). The trial court, in not instructing the jury to limit its use of Exton’s prior inconsistent statements, permitted the jury to conclude not just that Exton was unworthy of belief or lacked credibility, but that Exton’s first statement was evidence that Patton shot Flesner. The trial court’s omission of a prior inconsistent statement instruction helped to substantiate defendant’s theory that Patton was the shooter. Given that defendant’s argument was that Patton shot Flesner, limiting the use of Exton’s prior inconsistent statement to merely determining Exton’s credibility would only have harmed defendant’s theory. Since any error in the omission of the prior inconsistent statement jury instruction was harmless and worked in defendant’s favor, there is no plain error affecting defendant’s substantial rights.

Affirmed in part and vacated in part. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra